No. SC87445

IN THE MISSOURI SUPREME COURT

STATE EX REL. HOWARD J. VERWEIRE,

Petitioner,

v.

STEVEN MOORE, Superintendent,

Respondent.

Original Proceeding in Habeas Corpus

Respondent=s Statement, Brief and Argument

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STATEMENT OF FACTS

- The facts underlying the crime

On October 9, 1999, Howard Verweire was at the Play Station Arcade in Rockaway Beach, Missouri. App. 12, 13. He was armed with a Intratec model Protec .25 caliber semiautomatic pistol. App. 13-14. The pistol had one round chambered and six rounds in the magazine. App. 14.

Verweire stared at Kelly Roerick, a fourteen-year-old juvenile, for fifteen to twenty minutes. App. 5, 8. Roerick felt uncomfortable, and one of her friends, Raymond Marsh, stepped in between her and petitioner. App. 5, 8. Verweire told Marsh that Marsh A was blocking [his] view.@ App. 2, 5. Alex Crompton, the victim, then told twice Verweire that Roerick was only 14 years old. App. 1, 2, 5, 6, 8. Verweire and Crompton then exchanged obscenities. App. 5, 6. Verweire then pulled out his gun, walked up to Crompton, grabbed Crompton=s neck, and jabbed the gun in Crompton=s side and then in Crompton=s cheek. App. 1, 2, 5. Verweire also told Crompton that he would Ablow his [f---ing] head off@ and that he would Ashoot his [a--].@ App. 1, 2. Officer Tim Matthews of the Rockaway Beach Police Department arrested Verweire soon after this incident. App. 1. After waiving his *Miranda* rights, Verweire told the police that he Aaimed@ his pistol at a white male in the arcade and that he Apointed@ his gun at Aa kid=s face.@ App. 14, 16. Verweire admitted that he had been drinking beer Aall day,@ that he was taking prescription medications Prozac and Xanax, that he had smoked at least three bowls of marijuana prior to the assault, and that the substance the police found on his person was marijuana, which he described as Athe good stuff.@ App. 15.

- Procedural History

Based on these facts, the Taney County prosecutor filed charges against Verweire: one count of assault in the first degree and one count of unlawful use of a weapon. App. 20. The assault count was based on attempt to cause serious physical injury to Alex Crompton and the unlawful use of a weapon count was for carrying a concealed weapon. App. 20. Verweire chose to plead guilty to these charges on June 29, 2000. App. 23-26, 36-37. Verweire admitted in his petition to enter a guilty plea to pointing a gun at Alex Crompton, App. 23, that he pointed a gun at Crompton=s side and hit Crompton with the gun in the chest and head, App. 41-42. The court sentenced him to ten years on the assault count and five years on the unlawful use of a weapon count and ordered that the sentences be executed under '559.115, RSMo. App. 57, 62-63. The court subsequently granted Verweire probation after Verweire completed a 120-day program in the Department of Corrections and later revoked Verwiere=s probation. Verweire did not file a post-conviction relief motion under Rule 24.035.

Verweire then filed a petition for writ of habeas corpus in the Circuit Court of Dekalb County, which denied the petition. Pet. App. 49. Verweire next filed a petition in the Court of Appeals, Western District. After an evidentiary hearing, Judge James Eiffert, the appointed special master, recommended that habeas relief be denied, App. 85-90, and the Court of Appeals concurred, App. 91-93, *Verweire v. Moore*, 168 S.W.3d 518 (Mo.App. W.D. 2005). This Court denied transfer. *Verwiere v. Moore*, no. SC86894 (transfer denied Aug. 30, 2005). Verweire then filed his petition for habeas relief in this court.

ARGUMENT

- Verweire=s guilty plea estops his claim of innocence

Howard Verweire claims that he is actually innocent of the charge of assault in the first degree to which he pled guilty. Verweire=s claim does not allege any change in the law between the time he entered his plea and the time that he filed his habeas petition. Verweire=s claim also does not reflect any new evidence of actual innocence. He could have presented this claim to the plea court or in a post-conviction motion. He cannot now present this claim in a petition for writ of habeas corpus.

Verweire=s claim of actual innocence is based on the sole assertion that the State did not and cannot prove that Verweire acted with the necessary intent to commit the crime of first-degree assault. Pet.Br at 19, 20. This claim is foreclosed by the guilty plea transcript. Verweire and his attorneys told the plea court, with Verweire under oath, that Verweire understood the nature of the charges against him. App. 40-41. Verweire and his attorneys made the same assertions in the petition to enter a plea of guilty. App. 24, 27. Thus, Verweire and his attorneys stated that they were fully aware of the nature of the first-degree assault charge and choose to plead guilty because of their belief that a jury would convict Verweire. App. 24. A logical interpretation of these statements is that Verweire and his attorneys discussed and were aware of the nature and elements, including intent, of the crime of first-degree assault prior to Verweire pleading guilty.

Verweire=s statements and his attorneys= statements during the guilty plea process that they understood the nature of the charges and decided to plead guilty are contrary to his assertions here that he pled guilty without knowing that first-degree assault requires intent. He is

judicially estopped from making this argument by his contrary statements made under oath in the circuit court during his guilty plea: AA person who states facts under oath, during the course of a trial, is estopped to deny such facts in a second suit.@ *Collins v. Missouri Bar Plan*, 157 S.W.3d 726, 733 (Mo.App. W.D. 2005), *quoting Bellinger v. Boatmen=s National Bank of St. Louis*, 779 S.W.2d 647, 650 (Mo.App. E.D. 1989).

AJudicial estoppel applies to prevent litigants from taking a position in one judicial proceeding, thereby obtaining benefits from that position in that instance and later, in a second proceeding, taking a contrary position in order to obtain benefits from such a contrary position at that time.@ *Besand v. Gibbar*, 982 S.W.2d 808, 810 (Mo.App. E.D. 1998). Verweire claims in this petition that he was not aware, and his attorneys did not advise him, that intent was an element of the assault in the first degree. This claim is contrary to statements that Verweire made under oath in his guilty plea. He therefore is estopped from making this claim.

- Verweire cannot make a gateway claim of actual innocence **(Responds to Point I of the petitioner=s brief)**

Verweire contends that he can make a Agateway@ claim of actual innocence in order to receive a merits review of his defaulted claims under this Court=s decision in *Clay v. Dormire*, 37 S.W.3d 214 (Mo. banc 2000). Verweire=s argument ignores the central holding in *Clay*: that he use newly-discovered evidence to show his actual innocence. None of Verweire=s evidence is newly-discovered.

This Court in *Clay* held that in order to show a manifest injustice and overcome a procedural default, a habeas petitioner must Ashow that >a constitutional violation has probably resulted in the conviction of one who is actually innocent.=@ 37 S.W.3d at 217, *quoting Schlup*

v. Delo, 513 U.S. 298, 327 (1995)(further citation omitted). In order to demonstrate this probability, this Court, like the United States Supreme Court, held that a habeas petitioner must A>show that it is more likely than not that no reasonable juror would have convicted him in the light [of new evidence of innocence].=@ 37 S.W.3d at 217, *quoting Schlup*, 513 U.S. at 327.

Verweire cannot meet this standard because he fails to identify any newly-discovered evidence. In fact, in the seven pages of his brief dedicated to analysis of *Clay*, Verweire does not even recognize this Court=s requirement that he use newly-discovered evidence to make his claim of actual innocence. Pet.Br. at 18-25. Verweire uses only evidence and reasoning available to him at the time of his guilty plea. Allowing him to present this type of actual innocence claim in a habeas proceeding demeans the State=s interest in the finality of criminal judgments and allows Verweire to make an end run around the strict time requirements of a post-conviction relief motion under Rule 24.035.

Further, even setting aside the fact that Verweire does not use any newly-discovered evidence of actual innocence, his claim would still fail. In order to make a gateway claim of actual innocence under *Clay*, he must show that Ait is more likely than not that no reasonable juror would have convicted him.@ 37 S.W.3d at 217, *quoting Schlup*, 513 U.S. at 327. Verweire cannot make this showing.

In order to convict a defendant of assault in the first degree as pled in the information in this case, the State must prove that the defendant knowingly attempted to cause serious physical injury to another person. '565.050, RSMo 2000; App. 20. An attempt under Missouri law occurs when a person Adoes any act which is a substantial step towards the commission of the offense.@ '564.011, RSMo 2000. A

Asubstantial step@ is defined as Aconduct which is strongly corroborative of the actor=s purpose to complete the commission of the offense. *Id*.

In this case, Verweire cannot show, based on the evidence in the complete record, that no reasonable juror would have found him guilty. The facts of this case show that Verweire carried a semiautomatic pistol with a round chambered and six more rounds in the magazine into a Rockaway Beach arcade. App. 13-14. He got into a verbal altercation with some teenagers. App. 1, 2, 5, 8. In order to resolve this altercation, Verweire grabbed 14-year-old Alex Crompton by the throat, pulled out his gun, aimed it at Crompton, told Crompton that he was Agoing to blow his [f------] head off@ and AI shoot your [a--], jabbed Crompton with the gun in the cheek and the side, and then left. App. 1, 2, 5, 14, 16.

Based on this evidence, a reasonable juror could have found the essential elements of first-degree assault. If the juror believes the State=s witnesses, Verweire announced his intention to shoot and kill Crompton while aiming a loaded pistol at Crompton=s face and jabbing Crompton with the gun in the cheek and in the side. The combination of the threats and Verweire=s aiming of the gun are a substantial step toward the commission of the assault. *See State v. White*, 798 S.W.2d 694, 696-97 (Mo. banc 1990)(evidence was sufficient to show that defendant attempted to cause serious physical injury when he threw

the victim to the floor, told the victim Ashut up or I will stab you,@ and cut the victim without causing serious physical injury); *In re J.N.R.*, 687 S.W.2d 655, 656 (Mo.App. S.D. 1985)(evidence was sufficient to show that defendant attempted to cause serious physical injury when the defendant entered a hotel carrying a lug wrench and announced that he was there to assault the manager, who he identified by name). That Verwiere for whatever reason backed away and (thankfully) did not fire the gun at Crompton does not establish that no reasonable juror could have convicted Verweire of first-degree assault if he believed the State=s evidence. Verweire=s gateway claim of actual innocence therefore fails.

Verweire makes several arguments attempting to show a right to relief under *Clay*. First, he argues that there Ais absolutely no evidence to support nay inference that petitioner acted with the specific purpose to injure the victim.@ Pet.Br. at 20. The statement is false. Verweire put a loaded handgun next to the victim=s head and told him that he was going to blow his head off and shoot him. These actions demonstrate intent.

Verweire also insinuates that in order to have an attempted first-degree assault with a gun, the actor must pull the trigger. Pet.Br. 20. Although there are many cases in which this factual situation has arisen, it is by no means the only

factual situation justifying a first-degree assault conviction. In order to sustain an attempt conviction, the State only needs to show a Asubstantial step@ or Aconduct which is strongly corroborative of the actor=s purpose to complete the commission of the offense,@ '564.011, RSMo 2000. Verweire=s threats, coupled with the aiming a loaded handgun at the victim at point-blank range, demonstrate a substantial step in the assault.

Verweire attempts to prove that threats and a loaded gun are not enough by citing to this Court=s opinion in *State v. Sears*, 86 Mo. 169 (1885) for the proposition that the evidence was insufficient to support an assault conviction when a defendant aimed a loaded rifle at another person and threatened to shoot him if he didn=t leave his property. Verweire does not accurately state the holding in *Sears*, which held that the jury instruction was wrong because it omitted the element of intent. 86 Mo. at 169; *State v. Cox*, 43 Mo.App. 328 (1891); *State v. Llewellyn*, 93 Mo.App. 469, 67 S.W.677, 678 (1902). *Sears* was not a sufficiency of the evidence case and is therefore not relevant to this case.

- Verweire lacks a viable freestanding claim of actual innocence (Responds to Point I of the petitioner=s brief)

Verweire contends that he can demonstrate a freestanding claim of actual innocence. This Court laid the parameters for a freestanding claim of actual innocence in *State ex rel. Amrine v. Roper*, 102 S.W.3d 541 (Mo. banc 2003). Under this standard, a habeas corpus petitioner must prove his actual innocence by clear and convincing evidence, a standard higher than the civil standard of preponderance of the evidence and lower than the criminal standard of proof beyond a reasonable doubt. 102 S.W.3d at 548. AEvidence is clear and convincing when it >instantly tilts the scales in the affirmative when weighed against the evidence in opposition, and the fact finder=s mind is left with an abiding conviction that the evidence is true.=@ *Amrine*, 102 S.W.3d at 548, *quoting In re T.S.*, 925 S.W.2d 486, 488 (Mo.App. E.D. 1996). *Amrine* involved a capital case in which all of the witnesses at trial who testified that Amrine was the murderer subsequently recanted their trial testimony and no credible evidence of guilt from the original trial remained. 102 S.W.3d. at 548.

In the case at bar, no such evidence exists. As discussed more fully in the preceding section of this brief, the evidence shows that, in addition to his guilty plea itself, Verweire pulled out a handgun with six rounds in the magazine and one round in the chamber, aimed it at Alex Crompton, jabbed Crompton with the gun in the cheek, neck, and side, and told Crompton that he was going to blow his head off and shoot him. Verweire presents no contrary evidence. He also fails to argue in his brief that any of the State=s evidence is wrong.

Verweire attempts in his petition to augment the record with a new affidavit of a witness, David Jones, taken on December 20, 2005, Pet. Ex. 13, in order to show that Verweire did not make the Ablow your head off@ comment. The main problem with Jones= affidavit is that it does not contradict Jones= statement to the police that

> The [psycho] dude keep [sic] his hand by his pocket the hole [sic] time and was staring at Summer and Kelly, held the gun to Alexis [sic] throught, [sic] and head, cheek. [H]e was wearing camo. The fire arm [sic] was silver. I herd [sic] that he would blew [sic] his f[---]ing head off.

App. at 3-4. Jones= new affidavit shows only that a police officer may have used similar language in arresting Verweire at a later time. Jones states in the affidavit, made six years after the crime, that he does not remember if he heard what Verweire said at the time of the crime. Pet. Ex. 13. Jones= declaration does not contradict or call into question his statements to the police that Verweire threatened to blow Compton=s head off at the time of the crime and does not constitute clear or convincing evidence that Verweire is actually innocent of the assault. Additionally, Verweire completely fails to challenge Joel Naselroad=s statement that Verweire told the victim, while aiming the pistol at his face and holding him by the throat, AI shoot your [a--].@ App. 1.

In sum, there is no clear and convincing evidence that Verweire is innocent. Verweire supplies no evidence to weigh against the state=s evidence that was introduced at the hearing before the special master in the Court of Appeals. The evidence that he presents about David Jones= allegedly contradictory testimony at most goes to weight; it does not demonstrate that Verweire is innocent. This claim fails.

- Review of Verweire=s remaining claims is barred (Responds to Points II, III, and IV of the petitioner=s brief)
    - The claims are defaulted

Verweire contends that there was an insufficient factual basis for his plea (Point II), that counsel conducted an insufficient investigation into this case (Point III), and that the information deprived the plea court of jurisdiction because it omitted the intent element of first-degree assault (Point IV).

All of these claim are procedurally defaulted. Claims under Missouri Supreme Court Rule 24.02 alleging that a factual basis for the guilty plea was not adduced at the time of the plea are cognizable in a post-conviction relief motion under Supreme Court Rule 24.035. *Wofford v. State*, 73 S.W.3d 725, 727 (Mo.App. W.D. 2002); *Daniels v. State*, 70 S.W.3d 457, 460-61 (Mo.App. W.D. 2002); *Brown v. State*, 45 S.W.3d 506, 508-12 (Mo.App. W.D. 2001). Verweire did not file a Rule 24.035 motion. Therefore, he has procedurally defaulted on this claim. *State ex rel. Nixon v. Jaynes*, 63 S.W.3d 210, 214 (Mo. banc 2001).

Verweire=s third claim alleges that trial counsel were ineffective for advising him to plead guilty to first-degree assault. Claims of ineffective assistance of counsel are cognizable in a Rule 24.035 motion. *Clayton v. State*, 63 S.W.3d 201, 206 (Mo. banc 2001); Mo.S.Ct.R. 24.035(a). Verweire did not file a Rule 24.035 motion. Therefore, he has procedurally defaulted on this claim. *Jaynes*, 63 S.W.3d at 214.

Verweire=s fourth claim alleges that the information was deficient in that it omitted the word knowingly, an element of the offense, from the first-degree assault charge. Claims that the information was insufficient are cognizable on direct appeal after a guilty plea. *State v. Carter*, 62 S.W.3d 569, 570 (Mo.App. S.D. 2001); *State v. Sharp*, 39 S.W.3d 70, 72 (Mo.App. E.D. 2001); *State v. Sparks*, 916 S.W.2d 234, 236 (Mo.App. E.D. 1995). Verweire did not file a direct appeal of his conviction following his guilty plea. Therefore, he has procedurally defaulted on this claim. *Jaynes*, 63 S.W.3d at 214.

Verweire can overcome his default of these three claims only if he can show a jurisdictional defect, cause and prejudice, or a manifest injustice coupled with a constitutional violation. *Brown v. State*, 66 S.W.3d 721, 731 (Mo. banc 2002). Verweire argues that he can show a manifest injustice because he is actually innocent. Pet. at 7. However, as demonstrated in section II of this brief, he cannot show that he is actually innocent because he pled guilty to the offense and because he has not produced newly discovered evidence of his actual innocence. *See Clay v. Dormire*, 37 S.W.3d 214, 217 (Mo. banc 2000). Therefore, he cannot satisfy the Amanifest injustice@ test.

Verweire alleges that he can satisfy the Acause and prejudice@ test because his counsel advised him not to file a Rule 24.035 motion and because he did not want to jeopardize his chance at probation by filing a Rule 24.035 motion. Pet. at 9. However, this contention fails because Athe >cause= of procedural default >must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel=s efforts to comply with the State's procedural rule.=@ *Brown*, 63 S.W.3d at 726, *quoting Jaynes*, 63 S.W.3d at 215, *quoting Murray v. Carrier*, 477 U.S. 478, 488 (1986). Verweire=s desire not to prejudice his chance for a discretionary probation release is not a fact external to the defense. This case is similar to *State ex rel. Simmons v. White*, 866 S.W.2d 443, 446-47 (Mo. banc 1993), in which this Court held that an inmate was barred from using state habeas corpus to challenge his convictions when he decided not to pursue appeal or post-conviction remedies in order to give himself a better opportunity for probation. Verwiere=s desire to receive probation therefore does not constitute adequate cause to overcome his default; it was a calculated decision to give him the best opportunity for probation.

Verweire also contends that his attorneys= advice not to file a Rule 24.035 motion constitutes adequate cause. However, his attorneys= advice not to file the Rule 24.035 motion, which coincided with his own desire not to prejudice his chances for probation, does not constitute cause. Verweire is not complaining about ineffective assistance at trial or on direct appeal. He instead is complaining that he received ineffective assistance of counsel in declining to assert his post-conviction remedy. Ineffective assistance of counsel in a post-conviction setting cannot constitute cause for a procedural default. *Reese v. Delo*, 94 F.3d 1177, 1182 (8th Cir. 1996); *Lowe-Bey v. Groose*, 28 F.3d 816, 819 (8th Cir. 1994). Further, no factor external to the defense kept Verweire from filing a Rule 24.035 motion. He simply chose not to. Therefore, Verweire fails to demonstrate cause for the default of his second, third, and fourth claims.

As Verweire fails to demonstrate cause or prejudice, a manifest injustice, or a jurisdictional defect, his defaults act as a complete bar to this Court=s review of these claims.

- The claims fail on their merits

Verweire=s claim in Point II is that the plea court failed to set out a proper factual basis for the plea and that Verweire never understood and never was informed about the intent element of first-degree assault.